

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALESSANDRO DELFINO	:	DETERMINATION
For Redetermination of Deficiencies or for Refund of	:	DTA NO. 825732
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Years 2009 and 2011.	:	

Petitioner, Alessandro Delfino, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2009 and 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion filed December 12, 2013, seeking an order of dismissal or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Michelle M. Helm, Esq., dated December 11, 2013, and annexed exhibits. Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on January 13, 2014, the due date for petitioner's response. After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of two notices of deficiency.

2. The first Notice of Deficiency is dated December 19, 2012 and is addressed to petitioner, Alessandro Delfino, at a New York, New York, address. This Notice of Deficiency asserts additional New York State personal income tax in the amount of \$7,689.77, plus interest and penalty, for the year 2009 and bears assessment identification number L-038800750.

3. The second Notice of Deficiency is dated December 27, 2012 and is also addressed to petitioner at the above-noted address. It asserts additional New York State personal income tax in the amount of \$5,527.56, plus interest and penalty, for the year 2011 and bears assessment identification number L-038811407.

4. On April 3, 2013, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the two notices of deficiency. The request lists petitioner's address as the New York, New York, address.

5. On April 19, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices of deficiency was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on December 19, 2012 and December 27, 2012, but the request was not mailed until April 3, 2013, or in excess of 90 days, the request is late filed.

6. In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals. The petition lists petitioner's address as the same New York, New York, address. The Division subsequently brought this motion, dated December 11, 2013 seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner's protest of the statutory notices was filed more than 90 days from their dates of issuance.

7. To show proof of proper mailing of the Notice of Deficiency dated December 19, 2012, the Division provided the following: (i) an affidavit, dated November 27, 2013 of Bruce Peltier, a Principal Mail and Supply Supervisor in the Division's Mail Processing Center; (ii) an affidavit, dated November 27, 2013, of Daniel A. Maney, a Taxpayer Services Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Division's Case and Resource Tracking System (CARTS); and (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked December 19, 2012.

8. To show proof of proper mailing of the Notice of Deficiency dated December 27, 2012, the Division provided the following: (i) an affidavit, dated November 27, 2013, of Mr. Peltier; (ii) an affidavit, dated November 27, 2013, of Mr. Maney; and (iii) the "Certified Record for Presort Mail - Assessments Receivable (CMR) postmarked December 27, 2012.

9. The affidavits of Daniel A. Maney each set forth the Division's general practice and procedure for processing statutory notices prior to shipment to the mail processing center. Mr. Maney averred that he held this position since January 2010 and is fully knowledgeable of past and present procedures for processing notices, which have not changed since 1992.

10. The notices are predated with the anticipated date of mailing. With respect to the Notice of Deficiency dated December 19, 2012, each page of the 40-page CMR lists an initial

date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "12/19/12," to reflect the actual mailing date. With respect to the December 27, 2012 Notice of Deficiency each page of the 35-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. The date on the first page of this CMR was also manually changed in accordance with the Division's general procedure to "12/27/12," to reflect the actual mailing date.

11. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address."

12. Page four of the December 19, 2012 CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 1431 0986 and assessment identification number L-038800750 was mailed to "Delfino-Alessandro" at the New York, New York, address listed on the December 19, 2012 Notice of Deficiency. The corresponding mailing cover sheet bears this certified control number and the name, "Delfino-Alessandro," and the New York, New York, address.

13. Page five of the December 27, 2012 CMR indicates that a Notice of Deficiency with certified control number 7104 1002 9730 1440 2421 and assessment identification number L-038811407 was mailed to "Delfino-Alessandro" at the New York, New York, address listed on

the December 27, 2012 Notice of Deficiency. The corresponding mailing cover sheet bears this certified control number and the name, "Delfino-Alessandro," and the New York, New York, address.

14. The affidavits of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently a Principal Mail and Supply Supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a mailing cover sheet. A CMR is also received by the Center for each batch of notices. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A mail processing clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. In the ordinary course of business, a Center employee picks up the CMR from the USPS on the following day and returns it to the CARTS Control Unit.

15. A review of the CMR submitted by the Division in respect of the December 19, 2012 Notice of Deficiency confirms that a USPS employee affixed a postmark dated December 19,

2012 of the Colonie Center branch of the USPS to each page of the 40-page CMR. On the last page, corresponding to the heading “Total Pieces and Amounts” is the preprinted number “438,” which has been circled. On Page 40, a USPS employee wrote and circled his or her initials near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form. The affixation of the postmarks, the postal service employee’s circled initials, and the circling of the number 438 indicating that all such pieces were received, confirm that the Notice of Deficiency dated December 19, 2012 was received by the USPS on that date.

16. A review of the CMR submitted by the Division in respect of the December 27, 2012 Notice of Deficiency confirms that a USPS employee affixed a postmark dated December 27, 2012 of the Colonie Center branch of the USPS to each page of the 35-page CMR. On the last page, the USPS employee circled the preprinted entry of “380” corresponding to the heading “Total Pieces and Amounts,” and circled and wrote his or her initials. The affixation of the postmarks, the postal service employee’s circled initials, and the circling of the number 380 indicating that all such pieces were received, confirm that the Notice of Deficiency dated December 27, 2012 was received by the USPS on that date.

17. Petitioner’s 2011 New York resident income tax return, dated May 22, 2012, reported petitioner’s address as New York, New York. This was the last return filed by petitioner prior to the issuance of the subject notices. This address corresponds with the address on the CMRs and the notices that were sent to petitioner.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all papers and proof submitted, the administrative law judge finds that it

has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. In the instant matter, petitioner did not respond to the Division's motion and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In addition, petitioner has submitted no evidence to contest the facts alleged by the Peltier and Maney affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division's motion will be granted for the reasons set forth below.

C. Where the timeliness of a petition or a request for conciliation conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailings to petitioner's last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see id*).

D. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notices at issue to petitioner's last known address. The submitted affidavits and CMRs establish the Division's standard mailing procedure and that, in this case, the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioner's address on the notices, the corresponding mailing cover sheets and the CMRs conforms with the

address reported on petitioner's personal income tax return for 2011, which satisfies the "last known address" requirement in Tax Law § 681(a). It is concluded that the Division properly mailed the December 19, 2012 and December 27, 2012 notices and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on those respective dates (Tax Law § 170[3-a][a]; § 681[b]).

E. Petitioner's Request for Conciliation Conference was filed on April 3, 2013. This date falls beyond the 90-day period of limitations for the filing of such request. Petitioner's request was therefore untimely filed (Tax Law § 681[b]; § 170[3-a][b]). Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. (*Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

F. Finally it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 687[a]). If the claim for refund is disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

G. The petition of Alessandro Delfino is dismissed.

DATED: Albany, New York
March 27, 2014

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE